What Hath *Mt. Healthy* Wrought?

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Prior to January 1977, public employees who were disciplined by their employers in whole or in part because they engaged in constitutionally protected activities could rely on the federal courts to remedy their employers' actions. Then the United States Supreme Court delivered its opinion in *Mt. Healthy City School District Board of Education v. Doyle*,[1] which requires the courts to provide offending public employers a second chance to justify their otherwise tainted employment decisions. This Article will examine the *Mt. Healthy* decision and review the effect it and its progeny have had on labor relations litigation in the three years since it was rendered. In other words, what hath *Mt. Healthy* wrought?[2]

I. THE CONSTITUTIONAL RIGHTS OF A PUBLIC EMPLOYEE

The notion that public employment is a privilege to which no rights attach has long been discredited.[3] It is now beyond question that public employees enjoy the protection of the first amendment's guarantees.[4] This protection extends to both speech[5] and association.[6] The right is not absolute, however, and the courts, recognizing the special circumstances of the employment relationship, have permitted the public employer some flexibility in limiting the exercise of the right.[7]

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1. 429 U.S. 274 (1977).

2. In *Mt. Healthy*, the Supreme Court also disposed of issues of jurisdiction and sovereign immunity before treating the issues that form the basis for this Article. Beyond noting that the Court held that Doyle satisfied the monetary requirements set forth in 28 U.S.C. § 1331, 429 U.S. at 276-79, and that the Mt. Healthy City Board of Education "is more like a county or city than it is like an arm of the State . . . [and hence] not entitled to assert any Eleventh Amendment immunity from suit in the federal courts," *id.* at 280-81, this Article will not treat those other issues.

3. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that . . . teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

4. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

5. Smith v. Highway Employees Local 1315, ____ U.S. ____, ____, 99 S. Ct. 1826, 1828 (1979); Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 414 (1979); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284 (1977); Pickering v. Board of Educ., 391 U.S. 563, 574-75 (1968).

6. Smith v. Highway Employees Local 1315, ____ U.S. ____, 99 S. Ct. 1826, 1828 (1979); Elrod v. Burns, 427 U.S. 347, 357 (1976); Keyishian v. Board of Regents, 385 U.S. 589, 609-10 (1967); Thomas v. Collins, 323 U.S. 516, 530-31 (1945); AFSCME v. Woodward, 406 F.2d 137, 139 (8th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287, 288-89 (7th Cir. 1968).

7. *See, e.g.*, Muller v. Conlisk, 429 F.2d 901, 904 (7th Cir. 1970).

The Supreme Court in *Pickering v. Board of Education*[8] developed a balancing test that has since become the standard by which it is determined whether employee speech and related conduct is constitutionally protected. When the employee's statements or conduct can be shown to impede the performance of the duties of his job,[9] to have disrupted substantially the regular operation of the work place generally, to have interfered unduly with the maintenance of "discipline by immediate superiors or harmony among coworkers,"[11] "to have violated the need for confidentiality,"[12] or when "the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship . . . ,"[13] then the interest of the employer in limiting the employee's speech will be deemed sufficient to outweigh the employee's interest in commenting on matters of public concern.[14]

The enjoyment of this protection is not limited to permanent (that is, tenured) employees.[15] An employee's "lack of a contractual or tenure 'right' to re-employment . . . is immaterial to his free speech claim."[16] The consequence of his tenure, in constitutional terms, is that he must be afforded a due process hearing in connection with adverse employment decisions, a right to which the nontenured employee is not entitled.[17]

Prior to *Mt. Healthy*, the federal courts regularly granted relief to employees who showed that their employment was terminated wholly or in part because they exercised a constitutional right.[18]

II. *Mt. Healthy City School District Board of Education v. Doyle*

This, then, was the state of the law during Fred Doyle's employment as an untenured teacher in Mt. Healthy, Ohio. Doyle's teaching career was no different than most others until 1969, when he was elected president of

8. 391 U.S. 563, 569-570 (1968).

9. *See id.* at 572-73.

10. *See id.* at 573.

11. *See id.* at 570.

12. *See id.* at 570 n.3.

13. *See id. See also* Aumiller v. University of Del., 434 F. Supp. 1273, 1292 (D. Del. 1977).

14. Aumiller v. University of Del., 434 F. Supp. 1273, 1291 (D. Del. 1977).

15. Perry v. Sindermann, 408 U.S. 593, 596 (1972).

16. *Id.* at 597-98. *See* Shelton v. Tucker, 364 U.S. 479, 485-86 (1960).

17. Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972).

18. Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803, 806 (9th Cir. 1975); Skehan v. Board of Trustees, 501 F.2d 31, 39 (3d Cir. 1974), *remanded for further consideration on other grounds*, 421 U.S. 983 (1975), *rehearing en banc on other grounds*, 538 F.2d 53, *cert. denied*, 429 U.S. 979 (1976); Langford v. City of Texarkana, 478 F.2d 262, 266-68 (8th Cir. 1973); Gieringer v. Center School Dist. No. 58, 477 F.2d 1164, 1166 n.2 (8th Cir.), *cert. denied*, 414 U.S. 832 (1973); Simard v. Board of Educ., 473 F.2d 988, 995 (2d Cir. 1973); College Teachers Union Local 1600 v. Byrd, 456 F.2d 882, 888 (7th Cir. 1972), *cert. denied*, 409 U.S. 848 (1972); Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 210 (5th Cir. 1971).

the Teachers Association. He served as president for one year and then served on the Association's executive committee for another year.[19] During this period, the Association and the Board of Education negotiated directly on various topics relating to the teachers' working conditions.[20] In February 1971, the principal of the school at which Doyle worked circulated a memorandum to a number of teachers, including Doyle, concerning teacher dress and appearance. At the time, various bond issues were up for referenda and some school administrators apparently believed there was a relationship between teacher appearance and public support for these bond issues. Doyle understood that the teachers' dress issue was to be settled by joint teacher-administration action.[21] Viewing the memorandum as a breach of this understanding, Doyle revealed the substance of the memorandum to a local disc jockey whose radio station promptly put the news of the adoption of the dress code on the air.[22] The principal felt that the station acted at Doyle's behest and "called him on the carpet for it."[23] Doyle conceded that he should have first communicated any criticism he had to the school administration, and apologized to the principal for this oversight.[24]

Nevertheless, the next month, when contract recommendations for rehiring nontenured teachers were made, the superintendent recommended that Doyle not be rehired. The board adopted the superintendent's recommendation.[25] The decision of the board amounted to more than a dismissal. Had the contract been extended, Doyle's status would have changed from a nontenured to a tenured teacher.[26]

Following a request from Doyle for a written statement explaining the basis for the board's action, the board advised Doyle that he had shown "a notable lack of tact in handling professional matters which [left] much doubt as to [his] sincerity in establishing good school relationships."[27] The board proceeded to describe two incidents upon which it relied: (1) the radio station incident, which the board said "raised much concern not only within this community, but also in neighboring communities,"[28] and (2) an

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19. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 281 (1977).

20. Interview with John C. Burkholder, Attorney, Means, Bichimer, Burkholder & Baker, L.P.A., Columbus, Ohio (March 28, 1980). Mr. Burkholder was counsel for the Mt. Healthy school district at the trial court level.

21. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 282 (1977).

22. *Id.*

23. Petition for Certiorari, App. at 9a, Doyle v. Mt. Healthy City School Dist. Bd. of Educ., No. 74-8044 (S.D. Ohio, Sept. 9, 1974).

24. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 282.

25. *Id.*

26. *Id.* at 286.

27. *Id.* at 282.

28. "You assumed the responsibility to notify W.S.A.I. Radio Station in regards to the suggestion of the Board that teachers establish an appropriate dress code for professional people. This raised much concern not only within this community, but also in neighboring communities." Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. at 283 n.1.

earlier incident involving Doyle's use of obscene gestures in the school cafeteria to two girls who failed to obey a directive he issued as cafeteria supervisor.[29]

Doyle brought suit in the United States District Court for the Southern District of Ohio seeking reinstatement with tenure and back pay.[30] The district court found "the conversation with the radio station clearly protected by the First Amendment," and that this conversation "played a substantial part in the decision not to renew" Doyle's contract.[31] Thus, "even in the face of other permissible grounds," the district court concluded that the board's decision, tainted by a nonpermissible reason, could not stand.[32]

The United States Court of Appeals for the Sixth Circuit affirmed, in a brief order, concluding that substantial evidence in the record supported the district court's finding that the school board's action "was motivated at least in part" by Doyle's contacting the radio station about the dress code, "a constitutionally impermissible reason" to refuse to renew his contract.[33]

The Supreme Court reversed unanimously. Although it agreed with the lower courts that Doyle's communication to the radio station was constitutionally protected, the Court found fault with the reasoning behind the lower courts' conclusion that Doyle was therefore entitled to reinstatement with back pay.[34] The Court first reiterated its established principle that Doyle's lack of tenure did not defeat his cause.[35] The Court

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29. "You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present." Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. at 283 n.1. *See also id.* at 282. Following a heated verbal dispute with the students, Doyle gave the girls a two-fingered gesture which the district court explained to mean "bull____" Petition for Certiorari, App. at 8a-9a, Doyle v. Mt. Healthy City School Dist. Bd. of Educ., No. 74-8044 (S.D. Ohio Sept. 9, 1974). The girls responded with a one-finger gesture meaning "screw you." *Id.* Doyle admitted to the assistant principal that he had overreacted and the matter was ultimately straightened out by an apology and explanation from Doyle to the students. *Id.* at 8a.

30. At trial, several other incidents were described by representatives of the school board as evidencing Doyle's "lack of tact." On one occasion, he refused to accept an apology from a teacher who had slapped him during an argument in settlement of the matter, a refusal that ultimately escalated into suspensions for both teachers and a teacher walk-out in protest. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. at 283 n.1 at 281. However, the school board later lifted both suspensions with no prejudice to either teacher's record. Petition for Certiorari, App. at 6a, Doyle v. Mt. Healthy City School Dist. Bd. of Educ., No. 74-8044 (S.D. Ohio Sept. 9, 1974). Other instances included an argument with cafeteria personnel over the amount of spaghetti he had been served and a referral to certain students as "sons of bitches" in connection with a disciplinary complaint. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. at 281-82.

31. Petition for Certiorari, App. at 12a-13a, Doyle v. Mt. Healthy City School Dist. Bd. of Educ., No. 74-8044 (S.D. Ohio Sept. 9, 1974).

32. *Id.* The court awarded Doyle reinstatement with tenure, back pay, attorney's fees and costs. *Id.* at 13a-14a.

33. Petition for Certiorari, App. at 18a-19a, Doyle v. Mt. Healthy City School Dist. Bd. of Educ., No. 75-1382 (6th Cir. Dec. 10, 1975). The court of appeals vacated the award of attorney's fees based on the intervening decision in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). Petition for Certiorari, App. at 19aDoyle v. Mt. Healthy City School Dist. Bd. of Educ., No. 75-1382 (6th Cir. Dec. 10, 1975).

34. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284 (1977).

35. *Id.* at 283.

Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, *Board of Regents* v.

then proceeded to balance Doyle's speech with the interests of the school district in accordance with *Pickering* to determine whether that speech was constitutionally protected. Finding no suggestion "that Doyle violated any established policy, or that [the board's] reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum public," the Court accepted the district court's finding that Doyle's conduct was indeed protected by the first and fourteenth amendments.[36]

This analysis brought the Court to the question of the effect of the school district's response and to the issue of the relief to be granted in the circumstances. Here the Court parted with the district court's conclusion that because a nonpermissible reason played a substantial part in the decision not to renew, the employer's decision was necessarily to be stricken. Writing for the Court, Justice Rehnquist framed the issue thus: "[W]hether even if [the school board would have dismissed Doyle had the constitutionally protected incident not occurred], the fact that the protected conduct played a 'substantial part' in the actual decision not to renew—would necessarily amount to a constitutional violation justifying remedial action."[37]

The Court was explicitly concerned with the unjust reward the district court's conclusion would reap for an otherwise undeserving employee. The limited focus of the district court's analysis, the Supreme Court conjectured, "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[38] The Justices were particularly troubled by the possibility that a "borderline or marginal candidate" would be able, by engaging in protected activity, "to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record."[39] The Court saw this possibility as real if reinstatement was required "in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred."[40]

Therefore, the Court determined that before relief in the form of reversing the employer's decision is granted, an inquiry into the validity of other alleged bases for the employer's decision, and the weight they would

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Roth, 408 U.S. 564 (1972), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. *Perry v. Sindermann*, 408 U.S. 593 (1972).

Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. at 283-84.

36. *Id.* at 284.

37. *Id.* at 285.

38. *Id.*

39. *Id.* at 286.

40. *Id.* at 285. The Court was especially impressed by the undesirability of such an occurrence when the decision in question affects tenure, "[t]he long-term consequences of [which] are of great moment both to the employee and to the employer." *Id.* at 286.

have been accorded by the employer had the protected activity never arisen, is necessary. The Court reasoned that if the inquiry establishes that the decision would have been the same absent the impermissible consideration, then allowing the decision to stand would place the employee "in no worse position than if he had not engaged in the conduct."[41] By this result, "[t]he constitutional principle at stake is sufficiently vindicated"[42] because the employee's injury (that is, loss of his job) cannot be said to have been caused by a constitutional violation.[43] Likening the evaluation of employer motivation to that of voluntariness in criminal confessions, the Court decided that the aforementioned inquiry should protect "against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights."[44]

The Court concluded its opinion by summarizing the shifting burdens that henceforth would apply in determining whether proven constitutional violations have caused results justifying remedial action. Initially, the burden is on the plaintiff "to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' " in the decision being challenged.[45] In the face of this proof, the defendant can preclude remedial action for the consequences of the decision if it can show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct."[46] Because the decisions of the lower courts did not reveal what conclusion would have been reached had this test been applied,[47] the case was remanded for further proceedings.

III. THE THRUST OF *Mt. Healthy*

In *Mt. Healthy* the Court was concerned primarily with the consequences of the defendant's conduct and the scope of relief available to the plaintiff to remedy those consequences.[48] Thus, it held that "[t]he

41. *Id.* at 285-86.

42. *Id.* at 285.

43. *Id.* at 286-87. *See* Parker v. North Carolina, 397 U.S. 790 (1970); Wong Sun v. United States, 371 U.S. 471 (1963); Lyons v. Oklahoma, 322 U.S. 596 (1944).

44. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

45. *Id.* The Court cited Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 (1977) in support of its "motivating factor" language. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. at 287 n.2.

46. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. at 287.

47. The district court indicated only that "there did exist in fact reason . . . independent of any First Amendment rights or exercise thereof, to not extend tenure." Petition for Certiorari, App. at 12a-13a, Doyle v. Mt. Healthy City School Dist. Bd. of Educ., No. 74-8044 (S.D. Ohio Sept. 9, 1974). While this reason could have caused the school board to dismiss Doyle even absent consideration of his protected activity, there was no finding whether it would actually have done so.

48. United States v. Texas Educ. Agency, 579 F.2d 910, 916 (5th Cir. 1978) (*Mt. Healthy* stands for "the settled principle that the perpetrator of a constitutional wrong bears the burden of demonstrating that its violation had no effect, or a limited effect, on what actually happened."); Weissbaum v. Hannon, 439 F. Supp. 873, 879 n.7 (N.D. Ill. 1977) ("[T]he defendants can limit the

constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct."[49] It was the relief awarded by the district court, reinstatement, that the Supreme Court in *Mt. Healthy* saw as "the undesirable consequences not necessary to the assurance of [the constitutional] rights."[50] The burden *Mt. Healthy* places on the employer is not directed at the prima facie case itself. Plainly, if he can prove his decision was totally untainted, he does not need *Mt. Healthy* to prevail.[51] But, if he is unable to undo the finding that unconstitutional considerations entered into the challenged decision, he now has a second chance to escape liability.[52] *Mt. Healthy* allows him to convince the court that the plaintiff should take nothing because the circumstances were such that the plaintiff would have suffered the loss anyway. The burden on the employer, if he cannot refute the prima facie case, is to prove that even the prima facie case does not state a claim upon which relief should be granted.

Givhan v. Western Line Consolidated School District[53] confirmed this relief-oriented purpose of *Mt. Healthy*. Bessie Givhan was a school teacher who was dismissed after she criticized the school district's policies in private conversations with her school principal. Justice Rehnquist, again writing for a unanimous Court, determined that Givhan's criticisms, despite their private nature, were constitutionally protected. "Neither the [First] Amendment itself nor our decisions[54] indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."[55] Because *Givhan* was tried before *Mt. Healthy* was decided, however, the Court remanded on the question whether Mrs. Givhan "would have been rehired *but for* her criticism."[56]

Justice Rehnquist's description of *Mt. Healthy* in remanding *Givhan*

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plaintiff's remedy by showing by a preponderance of the evidence that they would have reached the same decision . . . ."). *See* Aumiller v. University of Del., 434 F. Supp. 1273, 1303 (D. Del. 1977) ("The existence of a collateral justification for defendants' actions possibly may be relevant to the *scope of relief* afforded to [the plaintiff], particularly regarding the appropriateness of reinstatement as a remedy."); Johnson v. Butler, 433 F. Supp. 531, 535 (W.D. Va. 1977) ("The teacher would be entitled to relief, however, only if the School Board were unable to show by a preponderance of the evidence that it would have reached the same decision . . . ."); *See also* Board of Trustees of Weston County School Dist. No. 1 v. Holso, 584 P.2d 1009, 1018 (Wyo. 1978).

49. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977).

50. *Id.* at 287.

51. *See, e.g.*, Rocker v. Huntington, 550 F.2d 804, 806 (2d Cir. 1977).

52. Morris v. City of Kokomo, ——— Ind. App. ———, ———, 381 N.E.2d 510, 517 (1978).

53. 439 U.S. 410 (1979).

54. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Board of Educ., 391 U.S. 563 (1968).

55. Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415-16 (1979) (footnote added). The Court found that the private nature of the expression might necessitate different considerations in striking the *Pickering* balance: "When a government employee generally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message, but also by the manner, time, and place in which it is delivered." *Id.* at 415 n.4.

56. Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415-16 (1979).

stressed the relief-related considerations underlying the former opinion. Thus, he wrote that in *Mt. Healthy* the Court "rejected the view that a public employee *must be reinstated* whenever constitutionally protected conduct plays a 'substantial' part in the employer's decision to terminate."[57] His concern was clearly with inequitably placing the employee in a better position merely because a part of the employer's motive was wrong. His decision was not so much intended to deny the significance of the unconstitutional motivation as it was to investigate its actual effect and to ensure that the employer's right to weed out the unsatisfactory employee is not eroded. Thus, the unconstitutional act being established, the remand in *Givhan* allowed the school district an opportunity to convince the district court that because the school district would not have rehired her in any event, Mrs. Givhan should not be reinstated.[58]

Too many courts have relied upon the causation test to evaluate the constitutional merits of the employer's decision.[59] It is the injury, not the violation itself, at which the causation test is directed. The plaintiff's satisfaction of his burden establishes the constitutional violation.[60] The

57. *Id.* at 416 (emphasis added).

58. The Court even went to the extreme of suggesting valid bases upon which the school district could rely before the district court, bases that "would hardly strike [the court] as surprising." Givhan v. Wester Line Consol. School Dist., 439 U.S. at 417 n.5. Justice Stevens, concurring, agreed with the court of appeals that the district court's finding that Givhan's protected activity was the "primary" reason for the school district's decision and "almost entirely responsible for her termination," foreclosed a *Mt. Healthy* claim. *Id.* at 417 (Stevens, J., concurring). He nevertheless agreed with the majority that the district court should decide whether the issue required further proceedings or could be decided on the existing record. *Id.* at 418 (Stevens, J. concurring).

59. *See, e.g.*, Skehan v. Board of Trustees, 590 F.2d 470, 480 (3d Cir. 1978):

> To the extent the *Mt. Healthy* Court adopted a "new" formulation of the test of causation for claims alleging dismissal from public employment for reasons violative of the first amendment, the "new" aspect of that formulation was the Court's holding that the defendants in such a case must be afforded an opportunity to rebut a prima facie case of impermissible motivation by showing by a preponderance of the evidence that they would have reached the same decision even in the absence of the constitutionally protected conduct of plaintiff.

Winters v. Lavine, 574 F.2d 46, 64 (2d Cir. 1978):

> [T]he Supreme Court has categorically stated that, despite the fact that the defendant governmental officials may have acted, in part, for reasons that do not comport with the requirements of the United States Constitution, the plaintiff's claim that his constitutional rights have been abridged cannot be sustained if the defendant governmental officials demonstrate that they "would have reached the same decision . . . even in the absence of [their reliance upon constitutionally impermissible factors.]"

Love v. Sessions, 568 F.2d 357, 361 (5th Cir. 1978) ("[I]f the Board's charges of insubordination and violation of rules are *both* true *and* a sufficient basis for the nonrenewal of [plaintiff's] contract, such that the same decision would have been made in the absence of constitutionally protected expression, the Board would have established a complete defense."); Franklin v. Atkins, 562 F.2d 1188, 1191 (10th Cir. 1977), *cert. denied*, 435 U.S. 994 (1978) ("[P]er se violations do not result from a 'consideration' of protected conduct . . . ."); Mazaleski v. Treusdell, 562 F.2d 701, 715 (D.C. Cir. 1977); Williams v. Day, 553 F.2d 1160, 1162-63 (8th Cir. 1977) ("Justice Rehnquist . . . took issue with the proposition that a constitutional violation occurs whenever a teacher's protected conduct plays a 'substantial part' in a school board's non-renewal decision."); Citron v. Jackson State Univ., 456 F. Supp. 3, 16 (S.D. Miss. 1977), *aff'd*, 577 F.2d 1132 (5th Cir. 1978) ("[T]he non-renewal [of a teacher's contract] would not amount to a constitutional violation if the Board, in fact, would have reached the same decision in any event.").

60. Carmichael v. Chambers County Bd. of Educ., 581 F.2d 95, 97 (5th Cir. 1978); Hastings v. Bonner, 578 F.2d 136, 141 (5th Cir. 1978).

causation test is only to determine whether the proven violation "justif[ies] remedial action."[61] The rule that consideration of constitutionally protected activity in the disciplinary decisionmaking process is offensive to the Constitution survived *Mt. Healthy* intact.[62]

One of the difficulties with the *Mt. Healthy* decision from the plaintiff's standpoint is how to refute the employer's assertion that the same decision would have been made regardless of the protected activity. If the employer has merely seized upon an allegedly legitimate excuse to punish the employee unlawfully, then a pretext case will have been made that eliminates the need to shift the burden to the employer. If the employer's purported reason is pretextual, then the impermissible reason will constitute the sole cause of discipline. But if the employer is able to survive a pretext argument, he obviously holds the advantage in resisting a judgment reversing his decision.

In the public sector at least, management officials are presumed to act in good faith with honest motives.[63] When this presumption is combined with the likelihood that crucial testimony will come from the individual who made the original tainted decision and "who is, correspondingly, more likely than someone else to want to vindicate" that decision—,[64] the plaintiff who cannot prove pretext will be hard-pressed to convince a court that other permissible grounds for the employer's action would not have been used to the same end.[65]

Should the case reach the stage where a "but for" defense is forthcoming, the plaintiff can rely on the unequivocal requirement that the employer show not only that he could have, but that he *would* have, done the same thing even absent the protected conduct.[66] The existence of valid

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61. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977). *Cf.* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 n.21 (1977) (If the village establishes "that the same decision would have resulted even had the impermissible purpose not been considered . . . , the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose.") *See also* East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403-04 n.9 (1977).

62. Hastings v. Bonner, 578 F.2d 136, 141 (5th Cir. 1978).

63. Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n., 426 U.S. 482, 497 (1976). *Cf.* Texas Instruments, Inc. v. NLRB, 599 F.2d 1067, 1073 (1st Cir. 1979) ("[T]he factfinder is bound to weigh the employer's asserted justification with some delicacy and deference."); Meyr v. Board of Educ., 572 F.2d 1229, 1233 (8th Cir. 1978):

> School boards and other public boards are as a matter of public knowledge frequently subjected to public criticism for making or failing to make appropriations . . . or . . . to grant salary increases. The statement made by the plaintiff is not the kind of statement that could be reasonably supposed to upset the school board officials.

Franklin v. Atkins, 562 F.2d 1188, 1190 (10th Cir. 1977), *cert. denied*, 435 U.S. 994 (1978):

> There must be made a beginning assumption that [school officials] were acting in good faith and aware of the constitutional problems. In this day and age, [they] are probably exposed more than any other group to constitutional claims, issues, and arguments in their day-to-day duties. These matters have thus become a part of their regular problem-solving functions.

64. Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 450 n.13 (1977).

65. *See, e.g.*, Foreman v. Vermilion Parish School Bd., 353 So. 2d 471, 473 (La. App. 1977), *cert. denied*, 355 So. 2d 257 (La. 1978).

66. Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 416-17 (1979); Mt. Healthy City

reasons to support the employer's decision is not enough—proving "that the same decision would have been justified . . . is not the same as proving that the same decision would have been made."[67] *Mt. Healthy* is clear that specific proof must be directed to this point; the reviewing court should not base its evaluation of the employer's defense on mere speculation.[68]

IV. THE NEED FOR SOME RELIEF

The answer to the question of what an employer would have done does not alter what it did do. Rather, it responds to the problem of what should be done as a result. The "but for" test is oriented toward the ultimate result of the employer's action. In this vein, some relief, even if only nominal, should be granted so that the employer who escapes having to reinstate the employee is nevertheless put on notice that the decision-making process he followed was improper. Even if the employer carries his burden precluding an order of reinstatement or back pay or both, the constitutional violation is proven once it has been shown that the protected activity was a substantial factor in the employer's disciplinary decision. The employee should still be permitted to offer proof of actual injury flowing from that impermissible consideration. The injury might take the form of emotional distress, embarrassment or humiliation, which are all compensable under section 1983.[69] While proof of such injury is not a simple task, it is by no means inconceivable that evidence of mental or emotional distress can be produced to support a substantial damage award in those circumstances.[70] The employee who loses his job for justifiable job-related reasons he can understand, should be less emotionally affected by the dismissal than the employee who knows that his engaging in constitutionally protected conduct contributed substantially to the decision to fire him. This latter employee will find little consolation in his employer's subsequent rationalization that although the dismissal was substantially motivated to retaliate for the protected activity, he would have been fired anyway. The message behind the partial retaliatory motive will not be lost in the judicial shuffle. The employee should be compensated for the psychological effects of his employer's openly impermissible considerations.

School Dist. Bd. of Educ., 429 U.S. 274, 285 (1977); Winters v. Lavine, 574 F.2d 46, 66 n.21 (2d Cir. 1978); Carr v. Board of Trustees, 465 F. Supp. 886, 902 (N.D. Ohio 1979). *Cf.* Fralin & Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315, 1318 (E.D. Va. 1979) (The court frames the issue in terms of whether permissible factors *could* have been considered). *But see* Garza v. Rodriguez, 559 F.2d 259, 261 (5th Cir. 1977), *cert. denied*, 439 U.S. 877 (1978).

67. Ayers v. Western Line Consol. School Dist., 555 F.2d 1309, 1315 (5th Cir. 1977), *vac. on other grounds sub. nom.*, Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979).

68. *Cf.* Carey v. Piphus, 435 U.S. 247, 266 (1978) (denial of absolute right of procedural due process).

69. Carey v. Piphus, 435 U.S. 247, 263-64 (1978); Aumiller v. University of Del., 434 F. Supp. 1273, 1309-10 (D. Del. 1977), and cases cited therein. *See also* Endress v. Brookdale Community College, 144 N.J. Super. 109, 142, 364 A.2d 1080, 1097 (1976).

70. *See generally* Carey v. Piphus, 435 U.S. 247, 263-264 (1978).

This approach is wholly consistent with that applied by the Supreme Court in the face of proof of unconstitutional procedural defects in public employment decisions.[71] In *Mt. Healthy* and *Givhan* the Court has devised a similar "harmless error" test for substantive constitutional rights.[72] Certainly these rights under the first amendment are no less fundamental than those under the fourth, fifth and fourteenth amendments. Violation of these rights, even if ultimately resulting in no egregious injury, should be accorded equal treatment.

This, it would seem, is the better accommodation that *Mt. Healthy* addresses. Otherwise, the employer may well become cavalier toward his constitutional obligation, announcing without reluctance his partial improper motivation.

The chilling effect of an employer's ultimate victory, despite the finding of a constitutional violation, will not be lost on other employees. No compelling interest can be shown to so tilt the balance against free speech and other protected activities.[73] Some relief is necessary to ensure that the constitutional violation is not trivialized to the point of irrelevancy.[74]

This section has considered the impact of *Mt. Healthy* on cases concerning employer violations of employee constitutional rights. The consequences of the case have not been thus limited. The effect of *Mt. Healthy* also extends to cases concerning employer violations of statutory rights.

V. *Mt. Healthy* AND THE NLRB

The effects of *Mt. Healthy* have been felt especially at the National Labor Relations Board (NLRB or the Board). Nearly two-thirds of all unfair labor practice charges filed with the NLRB allege employer action in violation of section 8(a)(3) of the National Labor Relations Act (NLRA or

71. Carey v. Piphus, 435 U.S. 247 (1978).

72. Doyle v. United States, 599 F.2d 984, 995 (Ct. Cl. 1979). *See* Carey v. Piphus, 435 U.S. 247, 260 (1978); Codd v. Velger 429 U.S. 624, 630 (1977) (Brennan, J., dissenting).

73. *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320-21 n.54 (1978) (Powell, J.).

74. *See* McGill v. Board of Educ., 602 F.2d 774, 780 (7th Cir. 1979). The desirability of preserving some relief in these cases, even if only in injunctive form to prevent unconstitutional considerations from entering into governmental decision-making, is heightened when one realizes that the *Mt. Healthy* test has been applied to constitutional questions across the board. *See, e.g.*, Duren v. Missouri, 439 U.S. 357, 367-68 (1979) (jury selection); Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979) (age discrimination); Fisher v. Flynn, 598 F.2d 663, 665 (1st Cir. 1979) (sex discrimination); Wilson v. Thompson, 593 F.2d 1375, 1385-87 (5th Cir. 1979) (retaliation for initiating civil litigation); Buise v. Hudkins, 584 F.2d 223, 229-33 (7th Cir. 1978) *cert. denied*, 440 U.S. 916 (1979) (prison transfers); Davis v. Village Park II Realty Co., 578 F.2d 461, 464 (2d Cir. 1978) (apartment lease terminations); Fralin & Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315, 1318-19 (E.D. Va. 1979) (rejection of low-to-moderate income housing plans); Upshur v. Love, 474 F. Supp. 332, 337 (N.D. Cal. 1979) (handicap discrimination); Marshall v. Commonwealth Aquarium, 469 F. Supp. 690, 692 (D. Mass. 1979) (retaliation for filing charges with government agencies); Lamb v. Hutto, 467 F. Supp. 562, 564-65 (E.D. Va. 1979) (prison transfers); Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 712 (D. Mass. 1978) (removal of books from school libraries); Arnold v. Ballard, 448 F. Supp. 1025, 1031-32 (N.D. Ohio 1979) (racially discriminatory hiring and promotion practices); Taylor v. Franklin Drapery Co., Inc., 441 F. Supp. 279, 298 (W.D. Mo. 1977), *vacated*, 443 F. Supp.

the Act),[75] which forbids employer encouragement or discouragement of union membership by discrimination in hiring, firing, or any term or condition of employment.[76] In administering this provision of the Act, the NLRB has consistently maintained that, in cases in which the employer's intent is a relevant consideration,[77] employer encouragement or discouragement of unionism that is motivated *in any part* by a discriminatory intent is an 8(a)(3) violation.[78]

The Board's "partial motive" standard for 8(a)(3) analysis has generally been accepted by the circuit courts of appeals.[79] The First Circuit, however, has rejected the Board's view and has adopted a "dominant motive" test.[80] In a "mixed motive" case—when the employer's encouragement or discouragement of unionism is motivated both by an anti-union animus and a legitimate business justification—the First Circuit standard requires not only a showing of discriminatory employer intent, but also a showing that such intent was the dominant factor in the

795 (1978) (retaliation for filing charges with government agencies); Dilley v. Alexander, 440 F. Supp. 375, 378-79 (D.D.C. 1977), *rev'd*, 603 F.2d 914 (D.C. Cir. 1979) (military selection-out procedure); Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 966 (D. Md. 1977) (racially discriminatory hiring and promotion practices); Whitehead v. Alexander, 439 F. Supp. 910, 912 (D.D.C. 1977) (military selection-out procedures); Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 260 (S.D. Ohio 1977), *aff'd, in part and rev'd and remanded in part*, 583 F.2d 787 (6th Cir. 1978), *application for stay granted*, 439 U.S. 1348 (1979) (Rehnquist, J.), *aff'd*, 443 U.S. 449 (1979) (school desegregation); Grayson v. Christian, 64 A.D.2d 887, 888, 407 N.Y.S. 2d 896, 897 (1978) (apartment lease terminations).

75. 42 N.L.R.B. ANN. REP. 11 (1977).

76. Section 8(a)(3) of the National Labor Relations Act provides, in pertinent part: "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3)(1977).

77. Subjective discriminatory intent in fact is not necessarily an element of an 8(a)(3) violation. When the employer's action does not, on its face, clearly encourage or discourage unionism, then a showing of subjective discriminatory intent on the employer's part is necessary to make out an 8(a)(3) violation. *See* Radio Officers' Union v. NLRB, 347 U.S. 17, 42-44 (1954); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937). When, however, the employer's action clearly encourages or discourages unionism, discriminatory intent is presumed. If the impact on unionism is "comparatively slight," the employer may rebut the presumption of discriminatory intent by showing a legitimate business justification for its actions. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967); NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963). Once the presumption has been rebutted, an 8(a)(3) violation can exist only upon an additional showing of subjective discriminatory intent in fact. If, however, the impact of the employer's action is "inherently destructive" of employee rights protected by the NLRA, then the presumption of discriminatory intent is considered conclusive and the NLRB can find an 8(a)(3) violation, without regard to an employer's assertion of a legitimate business justification. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. at 33-34. *See also* NLRB v. Erie Resistor Corp., 373 U.S. at 228.

78. *See, e.g.*, Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363 (3d Cir. 1978); NLRB v. Gogin, 575 F.2d 596 (7th Cir. 1978); Neptune Water Meter Co. v. NLRB, 551 F.2d 568 (4th Cir. 1977).

79. *See* cases cited in note 78 *supra*. *See also* NLRB v. Southeastern Stages, Inc., 423 F.2d 878 (5th Cir. 1970); Betts Baking Co. v. NLRB, 380 F.2d 199 (10th Cir. 1967); NLRB v. West Side Carpet Cleaning Co., 329 F.2d 758 (6th Cir. 1964); NLRB v. Great E. Color Lithographic Corp., 309 F.2d 352 (2d Cir. 1962).

80. *See* NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 669-72 (1st Cir. 1979); Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 97-99 (2d Cir. 1978); Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292, 1293 (1st Cir. 1977); DuRoss, *Toward Rationality in Discriminatory Discharge Cases: The Impact of* Mt. Healthy Board of Education v. Doyle *upon the NLRB*, 66 GEO. L. J. 1109, 1110-12 (1978).

employer's motivation.[81] Conversely, the Board would find an 8(a)(3) violation in such a case if the employer was even partially motivated by an anti-union intent.[82]

The First Circuit, and others critical of the NLRB's partial motive standard, find support for their dominant motive test of 8(a)(3) violations in mixed motive cases in the Supreme Court's holding in *Mt. Healthy*.[83] These advocates of the dominant motive test have sought to use *Mt. Healthy* as a death knell for the partial motive standard employed by the Board.

The critics of the Board would enact a wholesale transfer of a constitutional scheme, which is judicially regulated, to a labor relations scheme, which Congress intended to be regulated administratively. Plainly, there is no valid reason to believe that the Board's administration of the Act has been so deficient that it renders the balance struck by Congress imperfect. The multitude of charges brought against employers under section 8(a)(3) of the Act exposes as unfounded any fear that the partial motive standard "induc[es] employers to tread especially lightly when a union activist is involved—thereby violating the Act by encouraging pro-union activity."[84]

The better view is that expressed by Circuit Judge Thornberry, concurring in *Federal-Mogul Corporation v. N.L.R.B.*[85] Fully recognizing that the balancing of competing interests is essential in both the constitutional and labor arenas, Judge Thornberry properly distinguishes the responsibility of the courts in the former from that of the Congress in the latter. In enacting federal labor law, "Congress has already established a balance . . . [that] favors the employee, for Congress clearly recognized the superior bargaining position of the employer. The 'but for' standard significantly restrikes this balance in favor of the employer, and such a test is contrary to Congressional policy . . . ."[86] Until congressional intent to the contrary is expressed, the Board's partial motive standard should be retained.[87]

Moreover, the Board's critics fail to recognize that *Mt. Healthy*

81. Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292, 1293 (1st Cir. 1977). *See also* NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1312 (1st Cir. 1971); NLRB v. Lowell Sun Publishing Co., 320 F.2d 835, 842 (1st Cir. 1963) (Aldrich, J., concurring); NLRB v. Whitin Machine Works, 204 F.2d 883, 885-86 (1st Cir. 1953).

82. *See* cases cited in notes 78 and 79 *supra*.

83. *See* NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 669-72; Coletti's Furniture, Inc. v. NLRB, 550 F.2d at 1293; Duross, *supra* note 80, at 1112-26.

84. Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 99 (2nd Cir. 1978).

85. 566 F.2d 1245, 1265 (5th Cir. 1978) (Thornberry, J., concurring).

86. *Id.* (citation omitted).

87. Even if the Board were to adopt *Mt. Healthy* standard, it should reject the dominant motive test advocated by the First Circuit. *See, e.g.*, NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1311-12 and n.1 (1st Cir. 1971) for an example of this standard. Plainly, "substantial" or "motivating" is not synonymous with "dominate." The *Mt. Healthy* rule does not require plaintiff to show that the impermissible element in the employer's decision was the dominant reason, only that it played a

addresses remedies for violations, not violations themselves. Unlike findings of fact, which are reviewed under the "substantial evidence" rule,[83] remedies are to be fashioned by the Board within its broad range of discretion.[89] Nevertheless, the reviewing courts in NLRB cases have been convinced that the "but for" standard enunciated in *Mt. Healthy* is a test for determining the violation rather than the relief. Thus, despite the Supreme Court's failure to require more of a plaintiff to prevail than a showing that the impermissible consideration was a "substantial" or "motivating" factor to establish a constitutional violation, the courts, relying on *Mt. Healthy* in reviewing the Board's determinations, have improperly required more to establish an 8(a)(3) violation.[90]

If used at all in 8(a)(3) cases, the "but for" test should be limited to examining the proper remedy to impose consistent with section 10(c) of the Act.[91] The intent of the Act is to remove pro- or anti-union considerations from employer disciplinary decisions. Proof that an employer considers pro- or anti-union activity in assessing discipline sufficiently establishes a violation of the Act. By considering protected activity in making employment decisions, an employer commits a per se violation of the Act. That valid justification would have resulted in discipline absent the protected activity does not negate the violation, it merely mitigates the need for the affirmative relief that would be required had no permissible reason also existed. A cease-and-desist order should still issue to halt the employer's practice of allowing impermissible considerations to enter into his disciplinary decisions. The Board, as well as the reviewing courts, should not ignore their responsibility to ensure this protection of the Act is maintained. This is the rationality that the Act demands in discriminatory discharge cases.

VI. CONCLUSION

This Article has attempted to explain the changes in labor litigation that have resulted from the Supreme Court's decision in *Mt. Healthy*.

substantial part. Carmichael v. Chambers County Bd. of Educ., 581 F.2d 95, 97 (5th Cir. 1978) (per curiam); Morris v. City of Kokomo, ____ Ind. App. ____, ____, 381 N.E.2d 510, 517 (1978). *But see* Franklin v. Atkins, 562 F.2d 1188, 1192 (10th Cir. 1977), *cert. denied*, 435 U.S. 994 (1978) ("paramount"); Tanner v. McCall, 441 F. Supp. 503, 513 (M.D. Fla. 1977) ("primary and dominant").

88. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477-78, 490-93 (1951).

89. *See* NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 612 n.32 (1969); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216-217 (1964).

90. *See, e.g.*, Western Exterminator Co. v. NLRB, 565 F.2d 1114, 1118 (9th Cir. 1977).

91. Section 10(c) of the National Labor Relations Act, 29 U.S.C. §160(c) (1977), provides in relevant part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act] . . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Plaintiff's lawyers who formerly were content to try discharge cases on a mixed motive theory find they now must engage in more extensive preparation to undercut every other alternative excuse for the employer's action. Defendant's lawyers find their clients avoiding financial liability despite their unconstitutional acts. Pressure on the NLRB to abandon its partial motive standard in discriminatory discharge cases has increased considerably. The fact that constitutional and statutory violations have occurred has been frequently lost in the shuffle. I hope the courts will pause to scrutinize *Mt. Healthy* more closely and then devise relief that does not command the "undesirable consequences" that the Supreme Court deems unnecessary to the assurance of constitutional rights.[92]

92. *Mt. Healthy* City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).